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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

123 2 1999

In the Matter of)
)
Implementation of Section 309(j) and) WT Docket No. 99-87
337 of the Communications Act of 1934)
as Amended)
)
Promotion of Spectrum Efficient) RM-9332
Technologies on Certain Part 90)
Frequencies)
)
Establishment of Public Service)
Radio Pool in the Private Mobile)
Frequencies Below 800 MHz)

To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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August 2, 1999

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SUMMARY

The Federal Communications Commission ("Commission") is presented herein the opportunity to adopt an integrated, comprehensive and consistent spectrum management policy using competitive bidding. Adopting a "comprehensive spectrum policy" would further reinvent the Commission into what Chairman Kennard calls the "New FCC" for the 21st Century by (a) promoting the most efficient use of the spectrum by all land mobile licensees, whether operating for private or commercial purposes; (b) eliminating unnecessary administrative burdens on Commission staff; and (c) strengthening the Commission's commitment to community by requiring all non-public safety land mobile licensees to support the Universal Service Fund, Telecommunications Relay Services Fund and other public interest programs supported today by commercial licensees.

Moreover, auctioning all land mobile radio spectrum, other than the "public safety" spectrum that Congress specifically exempted from competitive bidding, would bring an end to the Commission's corporate welfare program that places free spectrum in the hands of some of the Nation's largest companies. Permitting large multi-national corporations, such as Ford, Dow Chemical and McDonalds, to obtain free spectrum not only robs the American public of a return on this public resource, but it also fails to provide any incentive for efficient spectrum use. Competitive bidding encourages licensees to use the spectrum efficiently, and the Balanced Budget Act of 1997 eliminates any legal or policy

basis for excepting for-profit organizations from having to bid for spectrum with the same incentives.

Competitive bidding has proven to be the Commission's most efficient spectrum licensing tool as it assigns licenses in a timely manner to the parties that value them most highly. Auctions also streamline the licensing process, thus conserving Commission resources and eliminating administrative burdens. As Chairman Kennard recognized, since the adoption of competitive bidding "much has happened in terms of spectrum options, technological developments, the demand for additional spectrum and expanding globalization of the telecommunications marketplace." Given the proven benefits of auctions and the resulting array of available technologies and services for both individual consumers and large users, the public interest is **not** served by continuing to give away private land mobile spectrum.

Additionally, the flexibility provided by auctioning this spectrum for any fixed or mobile non-broadcast use is consistent with the Balanced Budget Act of 1997. Such flexibility ensures that the spectrum is put to its highest and best use, whether through private marketplace transactions or auctions, subject only to the 45 MHz Commercial Mobile Radio Services spectrum cap. If an incumbent private licensee, for example, concludes that commercial services better fulfill his/her communications needs, the Commission's rules should allow the marketplace to function properly by permitting the transfer of existing private licenses to any party otherwise eligible for the auction of that spectrum.

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To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") respectfully submits these Comments on the Notice of Proposed Rulemaking in the above-referenced docket.^{1/}

This proceeding, implementing provisions of the Balanced Budget Act of 1997 ("1997 Budget Act"),^{2/} provides the Commission an opportunity to further reinvent itself into what Chairman Kennard calls the "New FCC" for the 21st Century. In this rulemaking, the "New FCC" should complete the transition to a competitive bidding license assignment process for all non-public safety land mobile spectrum applications -- whether historically

^{1/} Notice Of Proposed Rulemaking, FCC 99-52, released March 25, 1999 ("Notice")

^{2/} Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

categorized as commercial or private -- as Congress mandated in amending the Commission's auction authority. Accordingly, the "New FCC" should implement the 1997 Budget Act in a manner that (a) promotes the most efficient use of the spectrum by all Commission land mobile licensees, whether operating for private or commercial purposes; (b) eliminates unnecessary administrative burdens on Commission staff; and (c) strengthens its commitment to community by requiring all non-public safety land mobile licensees to support the Universal Service Fund, Telecommunications Relays Services Fund and other public interest programs supported today by commercial licensees.^{3/}

Commissioner Ness has stated that the Commission must adopt a "comprehensive spectrum policy."^{4/} Herein lies the Commission's opportunity to establish an integrated, comprehensive and consistent spectrum management policy using competitive bidding to license both commercial and "private" land mobile communications to achieve the above-listed objectives. In the 1997 Budget Act, Congress provided that the "Commission *shall* use competitive bidding to resolve mutually exclusive initial license or permit applications" unless the applications fall within one of three specified categories: (a) public safety services, (b) digital television service, or (c) non-commercial educational broadcast

^{3/} See Remarks of William E. Kennard, Chairman, Federal Communications Commission, Georgetown University Law Center Continuing Legal Education Seminar, "The New FCC," October 1, 1998.

^{4/} Remarks of Commissioner Susan Ness before the Cellular Telecommunications Industry Association's Wireless '97 (March 3, 1997).

service.^{5/} As the Commission previously concluded, this list is exhaustive; not merely illustrative of non-auctionable spectrum.^{6/}

Congress, therefore, established a presumption of auctionability for all future mutually exclusive license applications, excepting only the above three specifically-defined services. The statute explicitly states that only those "public safety" or "private internal radio services used by State and local governments and non-governmental entities. . .that (a) are used to protect the safety of life, health or property; and (b) are not made available to the public..." are to be assigned via mechanisms other than competitive bidding.^{7/} Accordingly, the 1997 Budget Act requires the Commission to assign *all* non-public safety licenses -- i.e., licenses used for private internal operations or commercial operations on the 800 MHz Business and Industrial Land Transportation ("B/ILT") channels, 900 MHz B/ILT channels, and the trunked channels below 800 MHz -- via competitive bidding.

^{5/} See Notice at para. 18; see also Section 309(j)(1) and (2). Herein, Nextel does not address the digital television or non-commercial educational broadcast services. Nextel's limits its discussion to "public safety services," which are not subject to auction, and "non-public safety services," which are subject to auction.

^{6/} Notice at para. 20, citing First Report and Order, 13 FCC Rcd 15920 (1998).

^{7/} 47 U.S.C. Section 309(j)(2)(A). Where, as here, the statute is unambiguous and conclusive, there is no need to consider the legislative history. See *ACLU, et al. v. FCC*, 823 F.2d 1554, 1568 (DC Cir. 1987).

Auctioning all applications for land mobile radio licenses is not only consistent with the Commission's amended auction authority, it also is consistent with the realities of today's telecommunications marketplace and regulatory environment. As the record in Nextel's waiver request proceeding demonstrates,^{8/} many of the users of private land mobile radio spectrum are large, multi-national corporations that have been permitted to use this spectrum free of charge.^{9/} Like any other resource used in the production of for-profit goods and services, these companies should be required to compensate the "owner" of the resource -- in this case, the American public. Continuing to subsidize the for-profit endeavors of Fortune 500 and other large companies is corporate welfare and is not in the public interest.^{10/} Thus, in response to the Commission's query regarding the appropriate definition of

^{8/} In 1998, Nextel filed waiver requests to permit the completion of marketplace-driven business transactions with private mobile radio service licensees that would have integrated B/ILT channels into Nextel's commercial iDEN system. The Commission incorporated the record of that proceeding into this rulemaking proceeding. See Order, DA 99-1404, released July 21, 1999 (hereinafter "Nextel Waiver Proceeding").

^{9/} Smaller businesses, without the resources to construct and operate their own sophisticated telecommunications systems, often subscribe to multiple licensed shared communications systems, typically known as "community repeaters" -- essentially a commercial offering managed by a radio dealer on behalf of the various licensees sharing the system.

^{10/} Among the large corporations currently holding 100 or more licenses obtained at the American taxpayer's expense are the top five Fortune 500 companies in America -- General Motors, Ford, Wal-Mart, Exxon and General Electric. Other Fortune 500 companies holding more than 100 licenses include IBM, Dow Chemical, Northrup Grumman and McDonalds.

"private internal radio services,"^{11/} none is required. The 1997 Budget Act requires only a distinction between "public safety services" and "non-public safety services." The latter certainly does not include organizations using free radio spectrum assignments to produce and provide for-profit goods and services throughout the world, thus benefitting only their own bottom lines.

II. BACKGROUND

In the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), Congress added Section 309(j) to the Communications Act of 1934 to provide the Commission authority to use competitive bidding as a means for assigning spectrum.^{12/} Congress recognized that, without competitive bidding authority, the U.S. Government was giving away this "amazing national resource"^{13/} without some compensation for the American public. As Congressman Ed Markey stated during the U.S. House of Representatives debate on OBRA '93, "[i]n short, there has to be a better way to manage a precious federal resource than picking names out of a hat."^{14/}

Auctions, Congress and the Commission concluded, would award spectrum licenses to those who value them most highly and would

^{11/} Notice at paras. 32-33.

^{12/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2)(B), 107 Stat. 312, 392 (1993).

^{13/} See Comments of Commissioner Ness at the Commission's April 6, 1999 En Banc Hearing on Spectrum Management (hereinafter "En Banc Spectrum Hearing") at p. 9.

^{14/} Congressional Record, August 5, 1993, at H6163.

therefore use the spectrum most efficiently.^{15/} Since initiating auctions, according the Chairman Kennard, "much has happened in terms of spectrum options, technological developments, the demand for additional spectrum and expanding globalization of the telecommunications marketplace."^{16/} In particular, the Commercial Mobile Radio Services ("CMRS") marketplace, wherein most of the licensees have obtained spectrum via competitive bidding,^{17/} has become the "poster child for competition."^{18/} Prices for commercial wireless services are down and continuing to fall.^{19/} Consumers are enjoying increasing choices for wireless products and services as new entrants launch service and introduce digital technologies in the marketplace.^{20/}

Thus, competitive bidding, as the Commission correctly anticipated in 1994, is an "efficient licensing mechanism [that]

^{15/} Second Report and Order, PP Docket No. 93-252, 9 FCC Rcd 2348 (1994) ("Competitive Bidding Second R&O") at paras. 4-5. See also Statement of Congressman Mike Oxley at Congressional Record, August 5, 1993, at H6164 (Spectrum auctions encourage the development of new and innovative technology. . .")

^{16/} En Banc Spectrum Hearing at p. 2.

^{17/} Only the duopoly incumbent cellular providers in each market obtained their spectrum via comparative hearings or lottery.

^{18/} Speech of Chairman William E. Kennard, CTIA Convention, New Orleans, LA, February 9, 1999, "Crossing Into the Wireless Century," at p. 2.

^{19/} See In Re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, Fourth Report, FCC 99-136, released June 24, 1999 (hereinafter "Fourth Report on Competition").

^{20/} *Id.*

promotes the rapid deployment of a wide range of new products and services in all areas of the country, [thus] increas[ing] residential consumer and large user access to new technologies and services."21/ Given the proven benefits of auctions and the resulting array of available technologies and services for both individual consumers and large users, the public interest is **not** served by maintaining what one Commission economist calls the "traditional command and control approach to spectrum management" for the private land mobile spectrum at issue herein.22/ Delineating narrow, arbitrary categories of eligible uses and eligible licensees for particular frequencies -- and then giving the spectrum away for free -- is no longer justified or responsible spectrum management in today's marketplace. This approach, in fact, is wholly at odds with the flexibility envisioned by Section 303(y) as added by the 1997 Budget Act. OBRA '93 and the 1997 Budget Act impose on the Federal Government "an obligation to get for the taxpayers as much value as possible" from the spectrum.23/ This is not accomplished by providing spectrum "hand-outs" to Fortune 500 companies, which as a result, have little or no incentive to either build or use the most spectrally efficient, innovative communications systems.

21/ Competitive Bidding Second R&O at para. 7.

22/ Statement of Dr. Robert Pepper, En Banc Spectrum Hearing at p. 48.

23/ Statement of Rep. Ed Markey, Congressional Record, August 5, 1993, at H6163.

III. DISCUSSION

A. The 1997 Budget Act Requires Auction of All Non-Public Safety Spectrum

Pursuant to Section 309(j), as amended by the 1997 Budget Act, applications for all spectrum licenses are subject to competitive bidding unless they are for public safety services.^{24/} The Commission should assign only the following spectrum bands without auctions:

- (1) "all of the [private land mobile radio services] that are currently assigned to the public safety pool. . .";^{25/}
- (2) the newly-allocated 24 MHz of public safety spectrum services;^{26/}
- (3) public safety services at 220 MHz;^{27/} and
- (4) VHF Public Coast public safety spectrum.^{28/}

All other land mobile radio spectrum below 800 MHz, and at 800 and 900 MHz, is available for non-public safety land mobile radio systems -- whether commercial for-profit systems such as Specialized Mobile Radio ("SMR"), or for private internal systems

^{24/} As noted above, the Commission's interpretative obligations begin with the statute itself. As the Court stated in *ACLU et al. v. FCC*, ". . . it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself." *ACLU* at p. 1568, citing *Landreth Timber v. Landreth*, 471 U.S. 681 (1985). Moreover, the same court found that "leapfrogging ahead to the legislative history without carefully dwelling on the statute itself [would result in] interpretive error." *Id.*

^{25/} Notice at para. 27.

^{26/} *Id.* at para. 28.

^{27/} *Id.* at para. 29.

^{28/} *Id.*

used by business and commercial enterprises for their internal communications needs. Accordingly, the 1997 Budget Act requires that the Commission assign these licenses via competitive bidding with open eligibility subject only to the CMRS 45 MHz spectrum cap.^{29/}

1. Auctions are In the Public Interest

As both Congress and the Commission have concluded, auctions promote efficiency in the spectrum licensing process as well as in the introduction of new technologies on that spectrum.^{30/} When spectrum is given away, whether through first-come, first-served licensing or lotteries, the licensee has little incentive to implement spectrally-efficient technologies that will maximize the spectrum's capacity and usefulness. For example, Nextel has accumulated the majority of its 800 MHz spectrum through either private marketplace transactions or Commission auctions. Having invested significant resources in obtaining the right to use this "essential ingredient in [providing] national and international products and services,"^{31/} Nextel has rapidly developed and deployed the most technologically advanced, spectrally efficient SMR system in the history of the SMR industry. Since 1996, Nextel has attracted more than 3.5 million digital users to its network --

^{29/} See Third Report and Order, 9 FCC Rcd 7988 (1994) at paras. 248-251.

^{30/} See discussion at pp. 5-7 *supra*.

^{31/} Statement of Commissioner Ness at En Banc Spectrum Hearing at p. 8.

almost double the number of users the entire SMR industry has served since its inception nearly 20 years ago.

The rapid deployment of highly competitive Personal Communications Services ("PCS") networks definitively demonstrates that competitive bidding awards spectrum to those who value it most. As the "steward" for this national resource, the Commission is "charged with assuring the efficient use of spectrum for the benefit of the American public."32/ There is no justification for continuing to give away spectrum to non-public safety users deploying their spectrum in furtherance of for-profit enterprises, particularly in light of the numerous communications options available in today's CMRS marketplace.

When the Commission made what the Industrial Telecommunications Association and Personal Communications Industry Association today refer to as "well thought-out policy considerations underlying the original private wireless allocation...", there was no auction authority, there were few if any wireless communications options available to private users, and there was no reason to conclude that the American public was being short-changed by giving away spectrum to large corporations.33/ However "well thought-out" these more than a quarter century old decisions may have been, they are now anachronisms no longer justifiable given technological advances and contemporary

32/ Id. at p. 9.

33/ Letter to Ms. Magalie R. Salas, Secretary, from Mark E. Crosby and Donald J. Vasek, dated June 28, 1999, in DA 98-2206, at p. 2.

marketplace-based regulatory policies. Today, private licensees have numerous competitive alternatives to meet their communications needs; thus, Congress has concluded that if private licensees desire their own licenses, the American public is entitled to benefit from their private use of the Nation's spectrum resources.^{34/}

2. Increased Licensing Efficiencies

No one can dispute that competitive bidding has proven to be the Commission's most efficient tool for assigning spectrum. In addition to the rapid pace at which licenses have been assigned and services have been deployed, auctions have streamlined the Commission's internal processes. Auctioning all non-public safety spectrum would likewise reduce administrative burdens on the Commission by eliminating cumbersome site-by-site application and licensing procedures, and individual service rules. It would

^{34/} Moreover, to the extent private licensees obtain free spectrum assignments and then use any "excess capacity" to compete with commercial providers, the Commission bestows on them a regulatory advantage *vis-a-vis* commercial operators obtaining spectrum assignments at marketplace prices. If private users want to provide commercial services, they -- like any other commercial wireless provider -- should be required to pay for the right to use that spectrum. Thus, if the Commission decides to continue awarding private internal use systems by first-come, first-served licensing, contrary to the Congressional mandate and the public interest, it should require that those licensees use the spectrum only on systems where "all messages are transmitted between the fixed and operating positions located on the premises controlled by the licensee and the associated mobile stations or paging receivers of the licensee," and from which they are not making a profit. See Notice at para. 31, citing Section 90.7 of the Commission's Rules. Moreover, licensees operating on free spectrum assignments should not be permitted to enter into shared use "community repeater" type arrangements since such arrangements skirt the purposes of internal use and game the licensing system.

eliminate the need for pools and categories of services, thereby streamlining the application process. Pigeonholing the spectrum for use by pre-defined services and users moves the Commission backward to the licensing methodologies of two decades ago -- rather than moving it forward to Chairman Kennard's vision of a "New FCC" and Congress' vision of more flexible spectrum allocations.^{35/}

Competitive bidding for private licenses also would eliminate the necessity for frequency coordination as applicants would no longer receive site-by-site, non-exclusive, shared licenses. Without frequency coordination, the Commission could process applications more rapidly, eliminate the application backlogs that often occur, and eliminate an unnecessary and costly layer of administrative burden on licensees. More importantly, removing the need for frequency coordination through auctions would eradicate the inherent conflict of interest created by coordinators who have a Commission-sanctioned monopoly for the coordination of designated channels.^{36/} These coordinators readily accept the coordination fees of licensees while, at the same time, advocating positions to protect their monopoly status that are wholly at odds with the interests of those same licensees. There is, at a minimum, an appearance of impropriety created when licensees are forced to fund

^{35/} See Section 303(y), as added by the 1997 Budget Act.

^{36/} For example, the Personal Communications Industry Association is the exclusive coordinator of Business Pool channels while the Industrial Telecommunications Association is the sole coordinator for Industrial Land Transportation Pool channels.

the activities of the very organizations that are coordinating lobbying efforts directed against them.

3. Increased Community Support

As the Commission's Fourth Report on CMRS Competition aptly demonstrated, the Commission and Congress have rapidly achieved their goal of a competitive wireless marketplace. The Commission has witnessed a significant expansion in the number of facilities-based carriers in a market from the duopoly cellular carriers to as many as six or seven digital and analog providers. At the same time, the Commission also has imposed new obligations on those carriers to ensure that all Americans have access to such services and to enhance their public safety usefulness. When the Commission first allocated the 800 MHz (and later, 900 MHz) band, businesses and industrial users had few options other than installing their own internal communications system. There were rarely commercial wireless alternatives able to meet their needs in a world of limited capacity, limited coverage systems that were shared by multiple users.

Today, these business and industrial users have numerous options for meeting their internal communications needs, including subscribing to any one of several commercial services or continuing to provide their own services. Additionally, private users could obtain a portion of a commercial spectrum license through disaggregation, or a commercial provider could fulfill the private user's specific needs on a set-aside portion of its spectrum. To the extent these private users -- again, some of the world's

largest corporations -- begin to shift to commercial providers, similar to any other subscriber on a commercial system, they will be contributing to the Universal Service Fund, Telecommunications Relay Services fund, Enhanced 911 funds and other community-minded programs. By expanding the scope of commercial wireless providers' potential subscribers and adding perhaps millions of units to the commercial marketplace, the Commission can further its community-based objectives, and provide an even greater benefit to the American public.

B. Eligibility for Non-Public Safety Services

Consistent with the flexibility Congress envisioned in Section 303(y) of the Communications Act, there is no reason -- technical, legal or otherwise -- to place specific limitations on the usefulness of this non-public safety spectrum. The Commission should permit licensees to provide any fixed or mobile non-broadcast service.^{37/} Applicants seeking to provide private or commercial land mobile radio services would be governed by the service rules in Part 90. Applicants seeking to provide cellular or PCS services would be governed by the service rules in Parts 22 and 24, respectively.^{38/} Permitting a wide range of technically compatible services that also are compatible with services provided in adjacent bands will ensure that the Commission is following

^{37/} Excluding broadcast services ensures that there will be no "harmful interference among users," consistent with Section 303(y)(2)(C).

^{38/} See Notice Of Proposed Rulemaking, WT Docket No. 99-168, FCC 99-97, released June 3, 1999, at para. 10, fn. 19.

Congress' mandate for spectrum flexibility while also assuring "efficient use of [the] spectrum for the benefit of the American public."39/

Having concluded that all 800 and 900 MHz B/ILT channels, as well as the channels below 800 MHz, should be licensed through competitive bidding to assure they are awarded to those that will undertake their highest and best use, the Commission must ensure free alienability of incumbent licenses. Prohibiting such transactions would be wholly at odds with the auction of these licenses. If an incumbent B/ILT licensee, for example, concludes that commercial services will better fulfill his/her communications needs, the Commission should allow that licensee to transfer the license to any party otherwise eligible for the auction of that spectrum. Nextel's waiver request, incorporated in this proceeding, provides a record full of licensees seeking to replace their internal communications systems with commercial wireless services. To date, Commission Staff has prohibited these companies from completing business transactions that are in their economic interest simply because twenty-year-old rules prohibit it.

The Boeing Company, a private licensee and Fortune 500's ninth largest domestic corporation, complains in its opposition to Nextel's B/ILT Waiver Request that B/ILT licensees should not be permitted to profit from the sale of a license it received free of

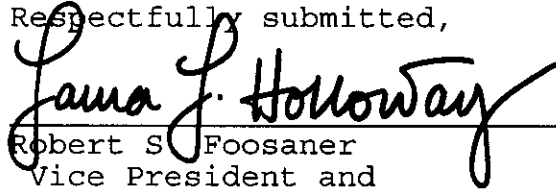
39/ Statement of Commissioner Ness at En Banc Spectrum Hearing at p. 9.

charge.^{40/} However, Boeing takes no issue with its own ability to obtain free spectrum at the American public's expense. Auctions would not only resolve the issue Boeing raises by requiring all licensees to pay for their licenses, but also would end the continued subsidization of the Nation's largest companies at taxpayers' expense.

III. CONCLUSION

For the reasons discussed herein, the public interest is not served by continuing to give away spectrum to non-public safety licensees. The Commission should provide spectrum free-of-charge only for public safety entities; all other users should be awarded spectrum licenses via competitive bidding.

Respectfully submitted,


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Date: August 2, 1999

^{40/} Letter to Ms. Magalie R. Salas, Secretary, from David Alan Nall and Kelly A. Quinn, filed July 2, 1999 in DA 98-2206, at p. 4.

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 2nd day of August 1999,
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A handwritten signature in black ink, reading "Rochelle L. Pearson", written over a horizontal line.

Rochelle L. Pearson